91-1688

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBBIE LUCAS, Petitioner,

v.

SCHNEIDER NATIONAL CARRIERS, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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April 21, 1992

QUESTION PRESENTED

Must a motion to amend a complaint be supported by evidence sufficient to overcome a motion for summary judgment?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Robbie Lucas and the respondent Schneider National Carriers, Incorporated.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ROBBIE LUCAS, Petitioner,

v.

SCHNEIDER NATIONAL CARRIERS, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner Robbie Lucas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 22, 1992.

OPINIONS BELOW

The opinion of the United States Court for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, p.12, infra.

The memorandum opinions of the United States District Court for the Eastern District of Tennessee (Jordan, D.J.) have not been reported. They are reprinted in the appendix hereto, p. 2, p. 9, infra.

JURISDICTION

Invoking diversity jurisdiction under 28 U.S.C. § 1332, the petitioner brought this suit in the Eastern District of Tennessee. On October 5, 1990, the Eastern District granted respondent's motion for summary judgment, ordered the action dismissed and denied petitioner's motion to amend her complaint as moot. See Appendix, p. 1, infra. On November 2, 1990, the Eastern District denied petitioner's motion to set aside the summary judgment. See Appendix, p. 8, infra.

On petitioner's appeals, the Sixth Circuit on January 22, 1992 entered an opinion affirming the orders of the Eastern District. See Appendix, p. 12, infra.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

FEDERAL RULE OF CIVIL PROCEDURE 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

STATEMENT OF THE CASE

On April 8, 1988, Estill Lucas, an employee of the respondent Schneider National Carriers, Inc., was driving one of the defendant's trucks, a semi tractor-trailer, on Interstate 40 West in Roane County Tennessee, within the course and scope of his employment and in furtherance of the respondent's business. Estill Lucas lost control of the tractor-trailer, rolling the truck over a guard rail and throwing the petitioner, Robbie Lucas, from the cab. The semi then rolled over the petitioner, traumatically amputating her leg and severely injuring her right leg. The driver died and the petitioner has now incurred over $116,000 in medical expenses.

The petitioner, on March 31, 1989, sued the respondent for the negligence of its driver under a theory of imputed liability.

On August 10, 1990, respondent's counsel deposed the petitioner. On that same date, petitioner's counsel made an informal discovery request for the personnel file of respondent's truck driver. A copy of the file was delivered on August 15, 1990.

On August 31, 1990, respondent moved for summary judgment. Petitioner responded on September 20, 1990.

On September 20, 1990, petitioner also moved to amend her complaint to add, to her original allegations of imputed liability, new allegations of direct liability based upon the documents received on August 15, 1990.

On October 5, 1990, the District Court granted respondent's motion for summary judgment, dismissed the action, and denied petitioner's motion to amend as moot. See Appendix, p. 1, infra. Its memorandum opinion did not mention petitioner's motion to amend. See Appendix, pp. 2 - 7, infra.

On October 15, 1990, petitioner moved the District Court to set aside its summary judgment, respectfully submitting that it was an abuse of discretion for the trial court to dismiss her suit without first considering her motion to amend.

On November 2, 1990, the trial court denied petitioner's motion to set aside its judgment. See Appendix, p. 8, infra. In its

Memorandum Opinion, see Appendix, pp. 9 - 11, infra, the trial court stated (Appendix, pp. 10 - 11, infra.):

> The addition to this lawsuit of the theories set forth in the plaintiff's proposed amendments to her complaint would still have left her with the burden of proving that some negligence on the part of the deceased driver caused her injuries. Because the plaintiff failed to show a genuine issue of fact on this point, the Court had no choice but to award summary judgment in favor of the defendant.

The petitioner appealed that order to the Sixth Circuit on November 2, 1990.

In her appeal, petitioner argued, inter alia, that the District Court had improperly focused its attention on the acts of the respondent's agent, instead of the agent itself, in considering her proposed amendments, and that the amendments should have been allowed under Fed. R. Civ. P. 15.

The Court of Appeals affirmed the trial court's order on January 22, 1992. See Appendix, pp. 12 - 25, infra. It agreed that the proper focus should have been on the acts of the respondent, rather than its agent, but it then applied the standards of Fed. R. Civ. P. 56, instead of the standards of Fed. R. Civ. P. 15, in testing the proposed amendments. Specifically, the Sixth Circuit said (Appendix, pp. 21 - 22, infra.):

> The proper focus of plaintiff's proposed claims is upon the actions of the defendant itself, rather than the defendant's agent, Estill Lucas. In order to support plaintiff's separate tort claims under Tennessee law, plaintiff was required to present evidence of the essential elements of those claims....Therefore, we do not consider any actions of Estill Lucas, but look directly to the evidence [plaintiff] presented to support its proposed claim of negligent entrustment.

The Sixth Circuit then decided that the trial court had properly

found that petitioner's proposed amendments would not be able to withstand a motion for summary judgment. See Appendix, p. 24, infra.

REASONS FOR GRANTING THE WRIT

The decision of the Sixth Circuit that the petitioner's proposed amendment to her complaint should be tested under a summary judgment standard is in conflict with decisions of this Court, other decisions of the Sixth Circuit and decisions in other Circuits.

INTRODUCTION

This Court should grant certiorari in this case because the divergence of opinion in the lower courts on the question presented poses a threat to the uniformity of federal procedure, see Hickman v. Taylor, 329 U.S. 495 (1947), Hanna v. Plumer, 380 U.S. 460 (1965), and because the question presented is an undecided question concerning the appropriate construction of a Federal Rule, i.e., Fed. R. Civ. P. 15; see Schlagenhauf v. Holder, 379 U.S. 104 (1964).

The Sixth Circuit relied upon Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973) in reaching its decision. Hageman, in turn, was based upon this Court's decision in Foman v. Davis, 371 U.S. 178 (1962), see Hageman, 486 F.2d at 484.

Foman lists several reasons for denying a motion to amend, Foman, 371 U.S. at 182, but the only one relied upon by the District Court and the Sixth Circuit was "futility of amendment, " (Appendix, pp. 10 - 11, p. 21 and p. 24, infra.)

Therefore, should this petition be granted, the only question that would be presented to this Court would be what is meant by "futility of amendment" in Foman.

"Futility" may mean inability to prove a claim or "futility" may mean failure to state a claim: the Circuits are divided on the question.

as will be shown. The best example of the lack of uniformity on the question presented, however, is the divergence of opinion within the Sixth Circuit itself.

I

THE DECISIONS OF THE SIXTH CIRCUIT ARE IN CONFLICT WITH EACH OTHER

The Sixth Circuit decision in this case affirmed the District Court order denying petitioner's motion to amend because petitioner failed to produce evidence in support of her motion that was "sufficient to establish a genuine question of fact." Therefore, the trial court "did not abuse its discretion in denying plaintiff's motion for leave to add the claim on the basis of futility," (Appendix, p. 24, infra).

Obviously, this panel of the Sixth Circuit was approving the use by the District Court of a summary judgment standard in deciding petitioner's motion to amend, as if it was deciding the motion under Fed. R. Civ. P. 56. Just as clearly, another panel of the Sixth Circuit mandated the use of the Fed. R. Civ. Pro. 12(b)(6) standard (failure to state a claim upon which relief may be granted), when it sustained a District Court decision allowing an amendment to a complaint in Roth Steel Prods. v. Sharon Steel Corp., 705 F.2d 134, 155 (6th Cir. 1983). Therefore, there is a divergence in the Sixth Circuit between the view that a motion to amend may be considered on the merits of the proposed claim (the case at bar) and the view that a motion to amend may be considered only on the sufficiency of the pleadings (Roth Steel, cited supra). It is a divergence of views that is typical of the confusion that has existed in the lower courts since Foman was decided, even though the view that a motion to amend may be tested on the merits is contrary to decisions of this Court, discussed below.

II

THE DECISIONS IN THE CIRCUITS ARE IN CONFLICT WITH DECISIONS OF THIS COURT

This Court indicated in Foman that the proper inquiry (in the absence of the other factors not at issue here) on a motion to amend was whether the amendment stated a claim, by saying:

> The Court of Appeals also erred in affirming the District Court's denial of petitioner's motion to vacate the judgment in order to allow amendment of the complaint. As appears from the record, the amendment would have done no more than state an alternative theory for recovery.

Foman, 371 U.S. at 182 (emphasis added). It has continued to construe Fed. R. Civ. P. 15 so as to allow, rather that deny, amendments in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) and Brandon v. Holt, 469 U.S. 464 (1985).

Notably, in Zenith, this Court took great pains to point out that it was upholding a decision to deny a motion to amend only on the assumption that the District Court had not denied the motion to amend on the merits, Zenith, 401 U.S. at 331, 332. Compare that to the decision of the Sixth Circuit in this case, which denied the amendment on the merits.

The decision in Zenith must also be compared to the decision of the Ninth Circuit Court of Appeals which said that a trial court may deny an amendment if permitting it would result in "futility for lack of merit," Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990).

Thus, both the Sixth and the Ninth Circuits have rendered decisions that conflict with the decisions of this Court in Zenith Radio Corp. and Foman. They have also rendered decisions that conflict with decisions in other Circuits, as discussed below.

III

THE DECISIONS OF THE CIRCUITS ARE IN CONFLICT WITH EACH OTHER

The Ninth Circuit is one of those Circuits which allows motions to amend to be decided on the merits by applying summary judgment standards, Gabrielson v. Montgomery Ward & Co., 785 F.2d 762 (9th Cir. 1985). This was also true of the former Fifth Circuit , see, Addington v. Farmer's Elevator Mut. Ins. Company, 650 F.2d 663 (5th Cir. July 1981).

On the other hand, other Circuits, such as the Second Circuit, have followed this Court's lead in Zenith Radio Corp., cited supra, and refused to consider a proposed amendment on the merits. Instead, they have limited the determination to whether a claim has been sufficiently stated. For example, in S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 43 (2d Cir. 1979), the defendant claimed to have evidence which would be decisive in having the proposed amendment dismissed on a motion for summary judgment. The Second Circuit refused to consider the evidence, stating:

> [W]here, as here, the alleged futility of the amendment rests on findings of fact we prefer to let the district court resolve the factual issues. If the documents referred to by [the defendant] are as decisive as it claims...the only prejudice it suffers from allowing [plaintiff] to amend is the inconvenience and expense of submitting these documents in support of a motion for summary judgment.

Silberblatt, 608 F.2d at 42, 43 (emphasis added).

It is important to note that in Silberblatt, unlike the case at bar, the trial court found an additional factor from Foman was present, i.e., prejudice, but that the Second Circuit still reversed the order

denying the amendment, id. In the case sub judice, there was no finding of prejudice by either the trial court or the Sixth Circuit. Clearly, if the case at bar had been appealed in the Second Circuit, it would have been reversed and remanded to the District Court, since there was no finding of prejudice by the trial court.

The lack of uniformity in the lower courts in their interpretation of Fed. R. Civ. P. 15 and Foman is patent, leading to different results in different jurisdictions. By this petition, petitioner respectfully requests this Court to protect the goal of uniformity in federal procedure, as in Hanna v. Plumer, 380 U.S. 460 (1965).

This lack of uniformity is not merely between panels of the Sixth Circuit, or between decisions of the Second Circuit and decisions of the Ninth and former Fifth Circuit. The Fourth Circuit has reversed a District Court order denying a motion to amend where, as here, no finding of prejudice had been made, see, Davis v. Piper Aircraft Corp., 615 F.2d 606, 612-4 (4th Cir. 1980). In that opinion, the Fourth Circuit said that "conjecture about the merits of the litigation should not enter into the decision whether to allow the amendment," id. at 613. While this statement is in complete accord with this Court's decisions in Foman and Zenith Radio Corp, cited supra, the decision of the Second Circuit in Silberblatt and the decision of the Sixth Circuit in Roth Steel, also cited supra, it is completely contrary to the decision of the former Fifth Circuit in Addington, cited supra, the decisions of the Ninth Circuit in Gabrielson and Jackson v. Bank of Hawaii, also cited supra, and the decision of the Sixth Circuit in this case. This is the divergence of opinion that has led petitioner to seek certiorari.

CONCLUSION

The issue, then, is whether a motion to amend is "futile," within the meaning of Foman, only if it fails to state a colorable claim, Silberblatt and others, cited supra, or if it also futile if it is not supported by evidence sufficient to overcome a motion for summary judgment, as in the case sub judice and as in Addington and the other cases, cited supra.

Foman states factors other than futility which may result in a

denial of a motion to amend. Foman, 371 U.S. at 182. While these issues were raised in motions in the District Court in this case, they were never decided by that court or by the Court of Appeals. They are, of course, issues of fact. Therefore, should the petition be granted and should the petitioner prevail in this Court, it would be necessary to remand to the Court of Appeals with instructions to remand to the District Court for appropriate findings of fact regarding these unresolved issues. They certainly do not need to be litigated here. See, e.g., Murray v. United States, 487 U.S. 533 (1988).

That makes this a single issue case: does "futility of amendment" mean failure to state a claim or inability to overcome a motion for summary judgment? After thirty years of confusion and uncertainty in the courts below, the issue is ripe for determination by this Court and this case provides an optimal framework within which this Court may provide a clear rule of law for the lower courts to follow.

RESPECTFULLYSUBMITTED,
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April 21, 1992

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION
No. CIV 3-89-0243

ROBIN LUCAS — Plaintiff

vs.

SCHNEIDER NATIONAL CARRIERS, INC. — Defendant

ORDER

For the reasons stated in the Court's Memorandum Opinion filed simultaneously with this Order, the Court finds the defendant's motion for summary judgment [doc. 9] well taken, and it is **GRANTED**. It is **ORDERED** that this civil action is **DISMISSED.**

The Court finds the plaintiff's motion [doc. 21] for a rehearing of the defendant's motion for summary judgment not well taken, and it is **DENIED**.

The Court finds the plaintiff's motion to amend her complaint [doc. 15] and her motion in limine [doc. 16] not well taken, and they are **DENIED** as moot.

ENTER:
Leon Jordan
United States District Judge

FILED: October 5, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION
No. CIV 3-89-0243

ROBIN LUCAS Plaintiff

vs.

SCHNEIDER NATIONAL CARRIERS, INC. Defendant

MEMORANDUM OPINION

This civil action came on for a hearing on Wednesday, October 3, 1990, at 8:30 a.m., on the defendant's motion for summary judgment. [Doc. 9.] Counsel for the plaintiff failed to appear at the time set for this hearing in the Court's Order filed on September 13, 1990. [Doc. 12.] The Court heard the argument of counsel for the defendant, considered the briefs and evidentiary material submitted by the parties [docs. 9A, 13 and 14], and considered the record of this civil action as a whole. For the reasons stated below, the Court finds the defendant's motion well taken, and will dismiss this civil action.

As is set forth in the Pretrial Order on November 16, 1989 [doc. 6], the plaintiff was a passenger in an over-the-road tractor which was involved in a single-vehicle accident on April 9, 1988 on I-40 West in Roane County, Tennessee. The defendant was the owner of the tractor, and the employer of the driver, who died in the accident. The plaintiff and the driver were wife and husband, and the plaintiff was not an employee of the defendant.

The defendant moved for summary judgment on two grounds. First, it says that its driver violated both its written policy and the applicable Department of Transportation (DOT) regulation by carrying the plaintiff, an unauthorized passenger, and that the driver therefore cannot be said to have been acting within the course and scope of his employment, in carrying the plaintiff, for the purposes of the doctrine of respondeat superior. Second, the defendant points out the plaintiff in her deposition testimony did not

assign any negligent act or omission to the driver for which the defendant might be responsible.

Taking the latter contention first, the plaintiff's deposition testimony shows clearly that she does not say that the driver, her husband, was negligent, and cannot thing of anything which he did in connection with the operation of the tractor which was wrong. She assumes that he fell asleep, but does not know whether he did, apparently because she herself was asleep at the time of the accident.

However, the plaintiff has submitted other evidence in opposition to the defendant's motion for summary judgment. In the affidavit of Terry Carrington [doc. 14, ex. C]. Setting aside his speculative conclusion that Mr. Lucas fell asleep and ran off the road, Mr. Carrington recounts what he saw as he followed the Schneider National Carriers tractor-trailer: it was going down a hill, then drifted, jerked back, and flipped. He says that the road condition, apart from the downgrade, was normal and that the weather was dry. The affidavit of Matt Dickey [doc. 14, ex. D] is to the same effect. The plaintiff has also submitted in opposition to the motion for summary judgment an unauthenticated copy of the accident report [doc. 14, ex. E], which clearly is inadmissible hearsay, and which in any event does not add significantly to the affidavit testimony of the two eyewitnesses.

Both affiants say that, immediately after the accident, the plaintiff gave them an envelope, saying that it contained important papers, and that the highway patrolman looked inside the envelope, and found that it was empty. The purpose of this evidence apparently is to support the plaintiff's story that her husband had a paper which authorized her to ride as a passenger, which she cannot now find. This subject will be discussed below.

The other evidence submitted by the defendant shows that the defendant, in keeping with the DOT regulation, had a strict policy regarding carrying passengers, which required in part applying in advance for permission in writing, signing a hold-harmless agreement, and obtaining insurance for the passenger. Permission to carry a passenger was granted for specific trips, not in a blanket manner. The management employee who would have given such permission to the plaintiff's husband denies that he did so, because the driver was not, he says, qualified by the length of his experience

as an employee of the defendant and by his safety record to receive permission to carry a passenger. [See doc. 9, exs. A, B, C, D, and F, affidavits made by management personnel of the defendant.]

In opposition to this, the plaintiff says that she signed a paper with the understanding that it gave her permission to ride with her husband. She cannot produce this paper or account for it; she assumes that her husband keep it in his wallet. She cannot say what were the contents of this paper. She cannot identify any permission to ride communicated to her by any employee of the defendant other than her husband. [See the excerpts of the transcript of her discovery deposition which are attached as exs. A and B to her response, doc. 14.]

Taking up the negligence issue first, the plaintiff argues that the defendant is not entitled to summary judgment, because there is enough in the record to show that the plaintiff will likely be entitled to a res ipsa loquitur instruction. In Schenk v. Gwalteny, 43 Tenn. App. 459, 309 S.W.2d 424, cert. denied, id. (Tenn. 1957), the Tennessee Court of Appeals was confronted with wrongful death actions brought by the survivors of guest passengers and governed by Indiana law, which granted a guest passenger a right of recovery only for wanton or wilful misconduct on the driver's part. The question was whether the plaintiffs could therefore recover on the basis of res ipsa, since the general rule is "that the doctrine of res ipsa loquitur is not applicable to establish willful and wanton negligence." Id. at ___, 309 S.W.2d at 435 (citation omitted).

In the course of answering this question, the Court of Appeals made its reading of Tennessee law plain:

> If this case were being tried under Tennessee law we would have no hesitancy in holding that there was material evidence to support the verdict of the jury under the application of the doctrine of res ipsa loquitur. This Court has had occasion recently to consider two cases very similar to these cases; that is, a car is found wrecked with all the occupants dead or unconscious and only the circumstances to indicate that the car left the regular lane of

traffic and crashed into a tree or bridge.

Id. at _____, 309 S.W.2d at 431 (citations omitted). Here, there is at least arguably even more to support the inference, the testimony of the eyewitnesses who were driving behind the tractor-trailer. If the issue of negligence were the only one presented, then, the Court would not be inclined to grant the defendant's motion.

Turning to the issue of the status of the plaintiff as an unauthorized passenger, in the most recently decided case cited by the parties, Ball v. Whitaker, 47 Tenn. App. 677, 342 S.W.2d 67, cert. denied, id. (Tenn. 1960), the plaintiff was a carnival worker, and the defendant trucker was under contract to haul the carnival's chattels, but not its personnel, from the carnival site to the railroad station. The trucker had given his driver express instructions not to carry any passengers on the tractor or on any wagon pulled by it, but the driver disobeyed these instructions, and the plaintiff suffered injury while riding on the trailer to the railroad station.

The Court of Appeals stated a rule:

> Where an employee, the driver of a truck, contrary to instructions from his employer, permits others to ride on the truck or a trailer, the status of the rider is not that of guest or invitee but of trespasser with respect to the employer. So, when such a rider is injured, the employer is liable only for such injuries as are caused by the wanton or wilful acts of the driver.

Id. at ____, 342 S.W.2d at 70 (citations omitted). The plaintiff has not submitted any evidence which would tend to show wanton or wilful conduct on the part of the driver, her late husband, and as noted above, under Tennessee law, the doctrine of res ipsa loquitur cannot be used to fill in this gap.

The plaintiff argues on the basis of older authority, Railroad v. Hailey, 94 Tenn. 383, 29 S.W. 367 (1985), that the plaintiff is entitled to be treated as a guest passenger. However, Hailey stands for the general proposition that one who pays a carrier

for passage, without being told that the carrier cannot carry passengers, can recover under the same rules which apply to authorized passengers. This is inapposite; even assuming that it applies outside the context of the carriage of passengers by railway companies and other carriers which customarily carry passengers, it does not apply to this plaintiff, who was not a passenger for hire, either authorized or unauthorized, of the defendant in its capacity as a carrier. She was simply riding for the convenience and pleasure of herself and her husband, the driver.

Home Stores, Inc. v. Parker, 179 Tenn. 372, 166 S.W.2d 619 (1942), relied upon by the plaintiff, does not contradict Ball v. Whitaker, supra. It is true that the Supreme Court in Home Stores stated that the related issues of whether an employee driver, in inviting an unauthorized passenger to ride, was acting within the course and scope of his employment, and whether the employee had actual or apparent authority to invite the passenger to ride, can be jury issues but the Supreme Court in that case approved a directed verdict of the defendant employer where there was no evidence to contradict the evidence that the invitation to passenger was unauthorized. The statements in Home Stores upon which the plaintiff relies must be understood in the context of the familiar rules that actual authority must be based upon some evidence of communication for the principal, or upon the principal's acquiescence int he agent's claim of authority. see Hart v. First National Bank of Memphis, 690 S.W.2d 536, 539 (Tenn. App.), permission to appeal denied, id. (Tenn. 1985) (citations omitted): "[A]gency cannot be proved by the declarations of the agent."

The plaintiff has not shown here a genuine issue of facts concerning whether her husband had actual or apparent authority to invite her to ride. Giving her the benefit of the doubt, and holding for the purpose of considering the defendant's motion that the best evidence rule would not bar her testimony concerning the paper which she says she signed to obtain permission to ride, and which she cannot produce, the facts remains that she cannot recall a single statement on this piece of paper giving her the authority to ride. She has not pointed to any communication from anyone employed by the defendant, besides her husband, regarding permission to ride. The defendant's evidence regarding the driver's lack of actual authority

is overwhelming.

For the reasons stated, the Court finds the defendant's motion for summary judgment well taken, and accordingly will dismiss this civil action.

ENTER:
Leon Jordan
United States District Judge

FILED: October 5, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION
No. CIV 3-89-0243

ROBIN LUCAS — Plaintiff

vs.

SCHNEIDER NATIONAL CARRIERS, INC. — Defendant

ORDER

For the reasons stated in the Memorandum Opinion filed simultaneously with this Order, the Court finds the plaintiff's Motion to Set Aside Summary Judgment [doc. 25] under Fed. R. Civ. P. 59(e) not well taken, and it is **DENIED**.

ENTER:
LEON JORDAN
United States District Judge

FILED: November 2, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION
No. CIV 3-89-0243

ROBIN LUCAS Plaintiff

vs.

SCHNEIDER NATIONAL CARRIERS, INC. Defendant

MEMORANDUM OPINION

This civil action is before the Court for consideration of the plaintiff's motion [doc. 25] to set aside the Court's award of summary judgment in favor of the defendant. For the reasons stated below, the Court finds the plaintiff's motion not well taken, and will deny it.

The Court filed it Memorandum Opinion [doc. 23] and Order [doc. 24] granting the defendant's motion for summary judgment on October 5, 1990. Applying Tennessee law, the Court held that the plaintiff had failed to show the existence of a genuine issue of fact concerning whether the deceased driver of the truck in which she was riding when she was injured had actual or apparent authority to give her permission to ride; that the plaintiff, as an unauthorized passenger, would be required to show willful or wanton conduct on the part of the driver, her husband; that the doctrine of res ipsa loquitur cannot supply proof or an inference of willful or wanton conduct, as opposed to simple negligence; and that the plaintiff had failed to show the existence of a genuine issue of fact concerning whether there was any conduct on the part of the driver which was willful or wanton, and which proximately caused the plaintiff's injuries. To the extent that the plaintiff seeks by her Rule 59(e) motion to reargue the defendant's motion for summary judgment, the Court finds it unnecessary to address these issues in detail, since they are addressed in the Memorandum Opinion [doc. 23] filed on October 5, 1990.

The plaintiff has submitted with her brief [doc. 25A] in

support of her motion a copy of a completed employment interview form obtained from the defendant's personnel file concerning the deceased driver. Written on this form beside the printed question "How Does Your Family Feel About Your Being Away from Home?" is the statement "wife was with him--no problem for her." The plaintiff contends that this is evidence that the defendant had knowledge or notice that she was riding with the driver, her husband, and that the defendant therefore through omission clothed the driver with apparent authority to carry her as a passenger.

Laying aside any concern that this copy of an interview form is unauthenticated, and treating it as evidence presented in opposition to the defendant's motion for summary judgment, the Court finds that it does not justify setting aside the Court's award of summary judgment in favor of the defendant. The plaintiff's reading of the quoted portions indicate nothing more than that the plaintiff was present with her husband at the time that he was interviewed concerning employment by the defendant, and that she indicated that she was not troubled by the prospect of him working as an over-the-road driver.

The final argument made by the plaintiff which the Court will consider is that the Court erred in awarding summary judgment in favor of the defendant while denying the plaintiff's motion to amend her complaint. While the Court, in the Order [doc. 24] granting the defendant's motion for summary judgment, denied as moot the plaintiff's motion to amend her complaint, the plaintiff is mistaken in the taking this to mean that the Court did not consider her motion. The Court did consider the plaintiff's motion to amend her complaint; however, even if the motion had been granted, the plaintiff's complaint as amended would not have been sufficient to prevent an award of summary judgment in favor of the defendant. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. 56(e). See also Celotex Corporation vs. Catrett, 477 U.S. 317 (1986). The addition to this lawsuit of the theories set forth in the plaintiff's proposed amendments to her

complaint would still have left her with the burden of proving that some negligence on the part of the deceased driver proximately caused her injuries. Because the plaintiff failed to show the existence of a genuine issue of fact on this point, the Court had no choice but to award summary judgment in favor of the defendant.

What is stated above distinguishes this case from Marks vs. Shell Oil Company, 830 F.2d 68 (6th Cir. 1987), upon which the plaintiff relies. The Court of Appeals in Marks found an abuse of discretion on the part of the district court because the district court failed even to consider the plaintiff's motion to amend. Id. at 69. Here, the Court has considered the plaintiff's proposed amendments, and found them insufficient to prevent an award of summary judgment in favor of the defendant. Furthermore, in Marks, the plaintiff asked that her proposed amended complaint be treated as her affidavit in opposition to the defendant's motion for summary judgment, and later submitted a first amended complaint in verified form. Id.

For the reasons stated, the Court will deny the plaintiff's motion to set aside the summary judgment awarded in favor of the defendant in this civil action.

ENTER:
Leon Jordan
United States District Judge

FILED: November 2, 1991

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

On Appeal from the United States District Court
For the Eastern District of Tennessee.
Nos. 90-6569/6570

ROBBIE LUCAS — Plaintiff-Appellant,

vs.

SCHNEIDER NATIONAL
CARRIERS, INC. — Defendant-Appellee.

BEFORE: JONES and NELSON, Circuit Judges; and JOINER, Senior District Judge (sitting by designation)

CHARLES W. JOINER, Senior District Judge. In this diversity tort action plaintiff, Robbie Lucas, brings consolidated appeals from the trial court's grant of defendant's summary judgment motion, and denial of plaintiff's motion for leave to amend her complaint and to set aside summary judgment. We conclude that the trial court correctly determined that plaintiff failed to demonstrate a genuine issue of material fact in response to defendant's motion for summary judgment; that defendant was entitled to judgment as a matter of law; and the trial court correctly found that plaintiff's proposed amended complaint would not survive a summary judgment motion and properly denied plaintiff's motion to amend. Accordingly, we affirm.

I.

Plaintiff's husband, Estill Lucas, worked as a truck driver for defendant from December 1986 to April 8, 1988. On April 8, 1988, plaintiff was traveling with her husband in a truck owned by defendant. While westbound on Interstate 40 in Tennessee the truck, for reasons unknown, left the roadway and overturned. Plaintiff,

asleep in the rear compartment of the truck's cab, was ejected from the cab and pinned in between the overturned trailer and the roadway. Plaintiff's left leg was amputated by the trailer, and her right leg was severely injured. Estill Lucas was killed.

Plaintiff filed her complaint on March 31, 1989, alleging that her deceased husband's negligence in driving defendant's truck was the proximate cause of her injuries, and that his negligence could be imputed to defendant by theories of express or apparent authority and agency. Because plaintiff could advance no explanation for the accident, she relied upon the doctrine of res ipsa loquitur to establish the negligence of Estill Lucas.

Defendant filed a summary judgment motion pursuant to Fed. R. Civ. P. 56(c), arguing (1) that plaintiff was an unauthorized passenger in defendant's truck; (2) that in transporting an unauthorized passenger, Estill Lucas acted outside the scope of his employment such that his negligence could not be attributed to defendant; and (3) that as an unauthorized passenger, plaintiff had trespasser status, such that only wanton or willful negligence on the part of the defendant's employee could make defendant liable for plaintiff's injuries.

Prior to the trial court's grant of defendant's motion, plaintiff filed a motion for leave to amend her complaint, pursuant to Fed. R. Civ. P. 15(a), to add claims of negligent entrustment and negligence per se. The trial court's memorandum opinion accompanying the order granting defendant's summary judgment motion made no mention of plaintiff's motion to amend, although the order contained a denial of the motion as moot. Contending that the trail court failed to consider her proposed amendments, plaintiff brought a motion to set aside summary judgment. The trial court denied plaintiff's motion, stating that the court had considered plaintiff's proposed amendments in granting summary judgment for defendant, but found that to grant leave to amend would have been futile, as the new claims could not survive a summary judgment motion.

In granting defendant's summary judgment motion, the trial court concluded that plaintiff was an unauthorized passenger in defendant's truck, and, therefore, her status was that of a trespasser as to defendant. The trial court found Tennessee law to hold that, as

to a trespasser, a principal in a negligence action will only be liable for injuries proximately caused by the wanton, willful or reckless negligence, cannot be established under Tennessee law through the doctrine of res ipsa loquitur, plaintiff could not impute Estill Lucas's negligence to defendant. In analyzing plaintiff's motion for leave to amend, the trial court found that the principles applicable to the analysis of plaintiff's imputed negligence claims also applied to claims of negligent entrustment and negligence per se, such that, in the absence of a showing of wanton or willful negligence, those claims must likewise fall.

On appeal, plaintiff contends that the trial court erred in its analysis of both motions. Addressing each motion in turn, we find no error.

II.

Under Fed. R. Civ. P. 56(c), the moving party is entitled to judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In Celotex Corp. vs. Catreet, 477 U.S. 317 (1986), the Supreme Court explained the operation of Rule 56(c):

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the

> nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The moving party bears the burden of providing the absence of a material issue of fact and the evidence produced must be viewed in a light most favorable to the nonmoving party. Adickes v. S.H. Kress Co., 398 U.S. 144, 157 (1970). Unless there is evidence favoring the nonmoving party sufficient for a jury to return a verdict for that party, there is no issue for trial. Anderson, 477 U.S. at 249 (citing First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 252, 288-89 (1968). If the evidence presented is merely colorable, or not significantly probative, summary judgment may be granted. Id. at 249-50 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam)). For purposes of a summary judgment motion, the substantive law identifies the facts which are material. Id.

Plaintiff argues that a genuine issue of material fact exists as to whether plaintiff had defendant's permission, whether express in the form of a "rider's pass," or implied by defendant's alleged knowledge of Estill Lucas' practice of having plaintiff travel with him, to be aboard defendant's truck on April 8, 1988. Plaintiff's status relative to defendant defines the duty owed to plaintiff. Duty is an essential element of plaintiff's negligence claim that plaintiff must prove.

In support of its summary judgment motion defendant presented, inter alia, the deposition testimony of its employee, Donald Frieson. Frieson testified to his knowledge of defendant's written policy regarding the transportation of passengers in defendant's vehicles, and his knowledge of Estill Lucas' awareness of the policy.

Accompanying Frieson's testimony, defendant presented the "authorized passenger policy" itself. The policy, adopted to

establish conformance with federal regulations,[1] permits employee drivers to transport their spouses (and only their spouses) if they meet particular criteria, and then, only for a limited period. In order for an employee to transport a spouse, that employee must make a written application. The application is reviewed (as part of his job duties, Frieson reviewed such applications) and, if the employee has not been involved in an accident that was adjudged "preventable" within six months of the application, then the application may be approved. Approval is also contingent upon the employee obtaining insurance coverage for the spouse and signing a hold harmless agreement. In no circumstance is approval granted to transport a spouse for a period greater than two weeks.

Frieson testified, and the policy itself states, that a blanket grant of permission to transport a spouse is never available. No employee was expressly authorized to extend an invitation to ride without satisfying he provisions of the policy. Having reviewed defendant's records, Frieson testified that Estill Lucas had not applied for permission to transport his spouse prior to April 8, 1988,

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[1] 49 C.F.R. § 392.60 states, in pertinent part:

> Unless specifically authorized in writing to do so by the motor carrier whose authority the motor vehicle is being operated, no driver shall transport any person or permit any person to be transported on any motor vehicle other than a bus. When such authorization is issued, it shall state the name of the person to be transported, the points where the transportation is to begin and end, and the date upon which such authority expires.

and, even if Lucas had done so, his application would have been denied under the policy because of his involvement in a preventable accident within six months of that date. Therefore, defendant argues, plaintiff was a trespasser in its truck and was owned only a duty not to be subjected to wanton or willful misconduct. See Ball v. Whitaker, 342 S.W.2d 67, 70 (Tenn. App. 1960), Reynolds v. Knowles, 206 S.W.2d 375, 377 (Tenn. 1947). As plaintiff could not establish such conduct on defendant's part, she failed to establish an essential element of her claim, entitling defendant to judgment. Anderson, 477 U.S. at 250. Further, plaintiff could present no evidence showing that Estill Lucas had the authority to transport passengers without meeting the criteria of the policy.

In response, plaintiff stated that she had been given a "rider's pass" by Estill Lucas, and that she believed this pass gave her defendant's permission to ride with her husband at any time. There is no evidence that Estill Lucas had authority to give a "rider pass" or to authorize anyone to ride with him. Plaintiff could not produce this document and could not recall any specific language within it.

Confronted with the evidence offered by the parties, the trial court found:

> The plaintiff has not shown here a genuine issue of fact concerning whether her husband had actual or apparent authority to invite her to ride. Giving her the benefits of the doubt, and holding for the purpose of considering the defendant's motion that the best evidence rule would not bar her testimony concerning the paper which she says she signed to obtain permission to ride, and which she cannot produce, the fact remains that she cannot recall a single statement on this piece of paper giving her the authority to ride. She has not pointed to any communication from anyone employed by the defendant, besides her husband, regarding permission to ride. The defendant's evidence regarding the driver's lack of actual

authority is overwhelming.

(App. at 86) [This Appendix at 6 - 7].

Plaintiff contends that the trial court impermissibly "weighed the evidence and determined the truth of the matter," Anderson, 477 U.S. at 249, and found that no "rider's pass" existed. However, the record shows that the trial court appropriately viewed the evidence in the light most favorable to plaintiff, Adickes, 398 U.S. at 157, but determined that plaintiff's deposition testimony failed to establish that she was an authorized passenger in defendant's truck. Even accepting plaintiff's statement that she had been given a "rider's pass," plaintiff presented no evidence to demonstrate that Estill Lucas gave her such a pass with defendant's permission.

In light of her complete failure to demonstrate that she was authorized to ride in defendant's truck, the trial court accurately determined that plaintiff was a trespasser under Tennessee law:

> Where an employee, the driver of a truck, contrary to instructions from his employer, permits others to ride on the truck or a trailer, the status of the rider s not that of a guest or invitee but of trespasser with respect to the employer. So, when such a rider is injured, the employer is liable only for such injures as are caused by the wanton or willful acts of the driver.

Ball, 342 S.W.2d at 70 (citing Home Stores v. Parker, 166 S.W.2d 619 (1942); Reynolds, 206 S.W.2d 375). Once plaintiff's status relative to defendant is determined, her claim cannot succeed as she cannot demonstrate the essential element of wanton or willful behavior on the part of Estill Lucas. Plaintiff sought to establish Estill Lucas' negligence through the doctrine of res ipsa loquitur. While this doctrine can be used to establish simple negligence, it cannot be used to show wanton or willful negligence. Schenk v. Gwaltney, 309 S.W.2d 424, 436 (Tenn. App. 1957); Sloan v. Nevil, 229 S.W.2d 350, 354 (Tenn. App. 1949). The trial court properly

applied the rule that when a nonmoving party has failed to make a sufficient showing of an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment. Anderson, 477 U.S. at 250.

Plaintiff next argues that a genuine issue of material fact exists as to Estill Lucas' apparent authority to grant permission for plaintiff to ride in defendant's truck. Apparent authority extending liability to a principal for the acts of its agent "is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing." 3 Am.Jur.2d Agency § 78(1986). Relying upon Hart v. First National Bank of Memphis, 690 S.W.2d 536 (Tenn. App. 1985), plaintiff contends that defendant's failure to post conspicuous notices within the cabs of its trucks warning riders that they may be mere trespassers in the eyes of the law, establishes apparent authority because such authority can arise through the principal's failure to act.

Plaintiff's reliance upon Hart is misplaced. In that case the Tennessee Court of Appeals stated that apparent authority must be based upon some evidence of communication from principal to agent, or upon evidence of the principal's acquiescence in the agent's claim of authority. Id. at 539. We again find that plaintiff presented no evidence of communication between Estill Lucas and defendant which granted permission to Estill Lucas to transport his wife.

Finally, plaintiff argues that evidence was presented showing the at defendant acquiesced to Estill Lucas' claim of authority to transport plaintiff. Plaintiff introduced a form used by defendant while interviewing Lucas for employment. The form shows that he was asked: "How does your family feel about your being away from home?" Below this question the interviewer wrote: "Wife was with him -- no problem for her." This, plaintiff contends, indicates that defendant was aware that she travelled with him and defendant acquiesced to that arrangement. The trial court found such a reading of the form "contorted, to say the least," and that the form simply indicated that plaintiff was present at the interviews. We agree with the trial court and conclude that plaintiff failed to present any evidence showing that defendant acquiesced to Estill Lucas' practice of transporting his wife without seeking permission under the authorized passenger policy.

III.

Federal Rule of Civil Procedure 15(a) provides that a party may amend its pleading once as a matter of course prior to service of a responsive pleading or within twenty days of serving its pleading if no responsive pleading is required. "Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The decision whether to permit amendment is committed to the discretion of the trial court. See Zenith Radio Corp. v. Hazeltine Research, Inc., 916 F2d 1119, 1130 (6th Cir. 1990). The trial court's discretion is not total, but is limited by Rule 15(a)'s "liberal policy of permitting amendments to ensure the determination of claims on their merits." Marks v. Shell Oil Co., 830 F.2d 68, 69 (6th Cir. 1987) (citing Espey v. Wainwright, 724 F.2d 748 (11th Cir. 1984)). The policy of liberality has been held to extend to situations in which a party seeks amendment in order to allege entirely new theories of recovery. Foman v. Davis, 371 U.S. 178, 182 (1962). See also 6 C. Wright & Miller, Federal Practice and Procedure, § 1474 at 547 n. 15.

This is not to say that leave to amend must be granted in every circumstance. In deciding whether to permit amendment, the trial court may consider such factors as undue "delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment...." Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973). Upon plaintiff's motion, the trial court determined that to permit addition of claims of negligence entrustment and negligence per se would be futile:

> The court did consider the plaintiff's motion to amend her complaint; however, even if the motion had been granted, the plaintiff's complaint as amended would not have been sufficient to prevent an award of summary judgment in favor of the defendant...The

> addition to this lawsuit of the theories set forth in the plaintiff's proposed amendments to her complaint would still have left her with the burden of proving that some negligence on the part of the deceased driver proximately caused her injuries. Because the plaintiff failed to show the existence of a genuine issue of fact on this point, the Court had no choice but to award summary judgment in favor of the defendant.

(App. at 91-92) [This Appendix at 10 - 11]

The trial court did not abuse its discretion in denying plaintiff's motion. The proper focus of plaintiff's proposed claims of negligent entrustment and negligence per se is upon the actions of defendant itself, rather than defendant's agent, Estill Lucas. In order to support plaintiff's separate tort claims under Tennessee law, plaintiff was required to present evidence of the essential elements of those claims. Tennessee precedent permits recovery against an employer for an independent tort in the choice of an individual as the employer's driver where no recovery is possible against the driver. See Beckendorf v. Simmons, 539 S.W.2d 31 (Tenn.; 1976); Wishone v. Yellow Cab Co., 97 s.W.2d 452 (Tenn. App. 1936). Therefore, we do not consider any actions of Estill Lucas, but look directly to the evidence defendant presented to support its proposed claim of negligent entrustment. The law in Tennessee regarding third parties who are not trespassers, "is that one who entrusts a motor vehicle to another must exercise, as to third parties, reasonable and ordinary care in the entrustment of the vehicle." Robinson v. Moore, 512 S.W.2d 573, 577 (Tenn. App., cert. denied, 1974); Ball v. Whitaker, 342 S.W. 2d 67, 70 (Tenn. App. 1960). The duty owed to trespassers, however, is only to not act wantonly or willfully. Ball, 324 S.W.2d at 70; Reynolds, 206 S.W. 2d at 377. While plaintiff contends that these cases establish only the duty owed to trespassers by an agent, as opposed to the duty owed by defendant directly, we find no reason in logic, or in Tennessee law,why the duty owed to a trespasser should vary according to the alleged negligent actor. Just as plaintiff failed to

show that Estill Lucas acted in a wanton or wilful fashion, she also failed to show that defendant acted in such a fashion, or even that defendant failed to exercise ordinary care in hiring Lucas.

In support of her motion, plaintiff presented evidence consisting of a series of documents purporting to show that defendant knew Estill Lucas was an incompetent driver. These documents relate to two specific areas of Lucas' driving record. Log records, kept by defendant on all its drivers, show that on at least three occasions defendant found Lucas to have exceeded, by up to 4 miles per hour, the 58 mile per hour speed limited that defendant imposes upon its drivers. Other log records show that Lucas exceeded the time for continuous driving which defendant imposes upon its drivers. Finally, plaintiff offered a letter from defendant to Lucas informing him that tan accident in which he had been involved had been adjudged preventable.

This evidence is not sufficient to establish a genuine question of fact as to whether defendant violated the duty of care owed to plaintiff. In Reynolds v. Knowles, 206 S.W.2d 375 (Tenn. 1947), the Tennessee Supreme Court addressed a claim against a truck owner (Reynolds) whose employee had, against the owner's instructions, transported a child in the truck. The child was deemed a trespasser. Id. at 376. The driver, an illiterate, had been employed for only three days prior to the accident, and had made a number of successful deliveries with the truck. Reynolds was aware that he did not have a driver's license, although apparently believing his story that he had left his license at home. Id. In reinstating a directed verdict for Reynolds, the court stated:

> It appearing that the little boy was a trespasser and that [the driver] had positive instruction not to ride children in the truck, the question presented is whether it was wanton, willful, or reckless negligence for Reynolds to permit [him] to operate the truck.
>
> `The actor's conduct is in reckless disregard of the safety of another if he intentionally does an actor fails to do an act

> which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.
>
> Restatement of the Law, Torts, § 500, p. 1293.

We are of the opinion that at the most the acts complained of are mere negligence. Id at 377 (emphasis supplied).

The evidence plaintiff contends establishes a question of fact as to defendant's negligence does not compare with the actions of Reynolds in employing an untrained illiterate, and does not indicate that defendant knew or had reason to know that employing Lucas involved a high degree of probability that a third party would be injured. Even if plaintiff were not a trespasser, the evidence presented falls short of facts which the court found to constitute mere negligence. Because plaintiff failed to present evidence creating a genuine issue of fact as to defendant's violation of the duty of care owed plaintiff, the trial court properly found that plaintiff's proposed negligent entrustment claim would not survive a summary judgment motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). Therefore, the trial court did not abuse its discretion in denying plaintiff's motion for leave to made the claim on the basis of futility. Hageman, 486 F.2d at 484.

Plaintiff lastly argues that she presented evidence of negligence per se, in that Lucas's employment application reveals that defendant knew that Lucas did not possess a Tennessee driver's license. This lack, plaintiff maintains, is violative of Tennessee Code § 55-50-403, which requires that one who becomes a resident of Tennessee must acquire a Tennessee driver's license within thirty days of establishing residence. Although the record indicates that Lucas was without a Tennessee license, the trial court correctly found that plaintiff presented no evidence showing that lack of a

license was a proximate cause of plaintiff's injuries. The fact that Lucas did not possess a Tennessee license at the time he applied for employment with defendant does not establish the essential element of proximate cause. As plaintiff failed to present evidence of this element of her claim, the trial court correctly found that he claim would not survive a summary judgment motion, Anderson, 477 U.S. 242, and did not abuse its discretion in denying plaintiff's motion for leave to amend her complaint.

AFFIRMED.
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(2)

No. 91-1688

In The

Supreme Court of the United States

October Term, 1991

ROBBIE LUCAS,

Petitioner,

vs.

SCHNEIDER NATIONAL CARRIERS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

REASON FOR DENYING THE WRIT

Futility of Amendment is a trial matter to be determined upon the record before the Court, and as such there exists no inconsistency as between circuit decisions on this matter and no material issue for review by this Court.

I.

Futility, is futility, is futility. Haggling over the definition of "futility" is an exercise in futility itself, certainly an unnecessary task for the Supreme Court of the United States. Such an exercise is indeed inappropriate for it neither (1) presents an important question of law, nor (2) involves any public policy interest, nor (3) results from a material inconsistency between decisions rendered upon the same issue by United States Circuit Courts of Appeal.

Petitioner would have this Court believe that there exists some grave inconsistency between circuits as to when to deny a motion to amend on grounds of "futility." Specifically, the petitioner suggests that once and for all this Court must make a final determination as to whether to define "futility" in terms of a Federal Rule of Civil Procedure 12(b)(6) or summary judgment standard. In furtherance of this proposition, petitioner has cited several cases from numerous jurisdictions which have purportedly defined "futility" in an inconsistent manner.

Upon closer examination it is clear that these courts have rendered perfectly consistent decisions. The determination of "futility" as it relates to a specific motion to amend is to be determined not upon a universal set standard, but instead upon the individual record before each court. That is, if a motion to amend is offered to combat a 12(b)(6) motion, such courts have properly looked to see if the amendments, if granted, indeed state a claim upon which relief may be granted. If so, the motion to amend should be granted. If not, the motion for leave is futile and properly denied. Likewise, if before the court the record contains a motion for summary judgment, the court must duly determine whether such amendments would survive the summary judgment attack. If not, they are undeniably futile and the motion must be denied. To allow an amendment under these circumstances would be an idle waste of judicial time, energy and client resources

for such additional claims would immediately henceforth fail. Quite simply, it is this approach which the Circuit Courts of Appeal have applied, for to act under any other methodology would clearly result in mass judicial waste. As the Fifth Circuit aptly stated, "[w]hen a Complaint, as amended, would be subject to dismissal, leave to amend need not be granted." Rule 15(a) does not require that courts indulge in futile gestures. *DeLoach v. Woodley*, 405 F.2d 496, 497 (5th Cir. 1968), citing *Foman v. Davis*, 371 U.S. 178 (1962).

For instance, taking two cases the petitioner contends as having resulted in an "inconsistent" application of futility, it is clear upon a reading of the full opinion in each that the decisions rendered are completely consistent, not only with one another, but also with the decisions of this Court, and the decisions of other circuits. Thus, there is simply no issue properly presented to this Court for review. In *S. S. Siblerblatt, Inc. v. East Harlam Pilot Block*, 608 F.2d 28 (2d Cir. 1979), the Second Circuit properly looked to the record before the court, which at the time leave was filed included only the complaint, and granted the movant's motion to amend upon finding that it stated a claim upon which relief could be granted. Obviously, a 12(b)(6) standard was applied because the defendant had not yet filed a responsive pleading. Similarly, in *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663 (5th Cir. 1981), the record included a motion for summary judgment when the movant's leave to amend was filed. As a result, the court properly denied leave after finding the proposed amendments would not survive the summary judgment attack. Such was the same result in the case *sub judice*.

The petitioner in this case was a trespasser in the respondent's truck on April 8, 1988. That issue has been duly determined at both the trial and appellate levels and is not at issue here. As such, the only duty owed her by the respondent was to avoid willful or wanton injury. *Ball v. Whitaker*, 342 S.W. 2d 67 (Tenn.

1960); *Reynolds v. Knowles*, 206 S.W. 2d 375 (Tenn. 1947). At the time the petitioner filed her motion to amend to include additional claims of simple negligence, the record before the court included the respondent's motion for summary judgment. At the subsequent motion hearings, District Judge Jordan duly considered both motions. Upon finding the petitioner's proposed amendments insufficient to overcome the respondent's summary jujdgment motion, Judge Jordan properly sustained the respondent's motion for summary judgment and denied as futile the petitioner's motion for leave to amend (R27). Naturally, the Court of Appeals for the Sixth Circuit affirmed and found no abuse of discretion (R31).

CONCLUSION

The determination of whether a motion to amend should be denied on grounds of futility must be based upon the individual record before the court, not a set uniform standard as suggested by the petitioner. Therefore, "futility" depends upon the purpose for which the motion was proffered. As such, the cases cited by the petitioner as "in conflict" with one another are indeed quite consistent, as the decisions rendered therefrom are based upon the record presented in each case. As follows, there is no material issue for review by this Court. Respectfully, the petitioner's writ should be denied.

Respectfully submitted,

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